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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JEREMY SCOTT WEITZEIL, Defendant and Appellant.	E066434 (Super.Ct.No. FWV1501756) OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Appeal dismissed.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant and appellant Jeremy Scott Weitzeil appeals from an order denying his Proposition 47 petition for resentencing and to redesignate his 2015 felony conviction for unlawfully driving or taking a vehicle with a prior vehicle theft conviction (Veh. Code, § 10851, subd. (a); Pen. Code[1], § 666.5, subd. (a)) to misdemeanor petty theft (§§ 490.2, 1170.18, subds. (a), (f), (g)). Defendant failed to offer any evidence with his petition or at the hearing on the petition that the value of the vehicle—a 2005 Mercedes C230—did not exceed $950 at the time he unlawfully drove it in 2015.

On appeal, defendant argues that Proposition 47 and the equal protection clause require his conviction for unlawfully driving or taking a vehicle under Vehicle Code section 10851, subdivision (a), be reduced to a misdemeanor and that the matter be remanded for a hearing to determine facts essential to this determination based on admissible evidence. Defendant also believes that Proposition 47 does not place the burden on the petitioner to establish eligibility. We requested the parties to submit supplemental briefs addressing whether the appeal should be dismissed because defendant failed to obtain a certificate of probable cause. After review, we conclude because defendant failed to secure a certificate of probable cause, his challenge to the 2015 felony of unlawfully driving or taking a vehicle with a prior vehicle theft conviction is not cognizable on appeal. We are bound by our Supreme Court's holding in *People v.*

[1] All future statutory references are to the Penal Code unless otherwise stated.

Mendez (1999) 19 Cal.4th 1084, 1099 (*Mendez*) that a defendant may not seek review of certificate issues unless he or she has complied with Penal Code section 1237.5 and California Rules of Court, rule 8.304(b)(1),[2] specifically and in a timely fashion. Consequently, we shall dismiss the appeal.

II

FACTUAL AND PROCEDURAL BACKGROUND[3]

On May 12, 2015, two days after police had found defendant in possession of a stolen vehicle and attached stolen U-Haul trailer, police stopped defendant while driving a stolen 2005 Mercedes C230. During the traffic stop, defendant was uncooperative and refused to put his phone down. Defendant claimed that he owned and operated a legitimate towing company and that he had obtained title to the vehicle on a lien sale for $1,500 from an impound yard. The victim had, however, reported the Mercedes stolen.

On May 14, 2015, defendant was charged with three counts of receiving a stolen vehicle (§ 496d, subd. (a)), to wit, a 2005 Mercedes C230, a 2012 U-Haul trailer, and a 2003 Toyota Rav 4, counts 1 through 3, respectively. Defendant was also charged with three counts of unlawfully driving or taking a vehicle with a prior vehicle theft conviction (§ 666.5), to wit, a 2005 Mercedes C230, a 2012 U-Haul trailer, and a 2003 Toyota Rav 4, counts 4 through 6, respectively. The complaint further alleged that defendant had suffered nine prior prison terms (§ 667.5, subd. (b)).

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[2] All rule references are to the California Rules of Court.

[3] The factual background is taken from the police report.

On November 19, 2015, defendant pled guilty to count 4—unlawfully taking or driving a 2005 Mercedes C230 while having a prior conviction for the same offense (§ 666.5, subd. (a); Veh. Code, § 10851, subd. (a)). In return, the remaining allegations were dismissed and defendant was sentenced to a stipulated term of four years in state prison to be served concurrently with his sentence in case No. FWV1400786.

On May 9, 2016, defendant filed a petition for resentencing to have his felony unlawful driving or taking a vehicle conviction designated as a misdemeanor under section 1170.18.

On June 17, 2016, the trial court denied defendant's petition, finding the crime did not qualify for relief under Proposition 47 and the evidence did not establish the vehicle's value was $950 or less. Specifically, the trial court stated: "It does appear that the defendant is statutorily ineligible; both the nature of the conviction and the amount involved in the theft; so for those reasons, the petition to reduce the matter to a misdemeanor is denied."

On July 7, 2016, defendant filed a timely notice of appeal. In the notice of appeal, defendant indicated the appeal is based on an "[o]rder after judgment affecting substantial rights of [defendant] or other order." He described the order as "[d]enial of Penal Code section 1170.18 petition." Defendant did not seek a certificate of probable cause.

III

DISCUSSION

Defendant argues that the trial court's order denying his petition should be reversed because Proposition 47 applies to Vehicle Code section 10851. Specifically, he claims that Vehicle Code section 10851, although not listed in Proposition 47, was intended to be included under the catch-all provision of Penal Code section 490.2 where the value of the property does not exceed $950. He maintains that the purpose and intent of Proposition 47, combined with the broad inclusive language in section 490.2, clearly shows that all thefts under $950 should to be treated as misdemeanors. Defendant also contends that constitutional equal protection principles require that a conviction under Vehicle Section 10851 be treated as a misdemeanor. Finally, defendant asserts that the trial court failed to conduct a proper Proposition 47 hearing and that Penal Code section 1170.18 does not place the burden on a defendant to prove the value of the stolen property.[4] Because defendant is in substance challenging the validity of his guilty plea and filed his petition after Proposition 47's effective date, we dismiss this appeal.

[4] We note the California Supreme Court in *People v. Page* (2017) 3 Cal.5th 1175, 1187 recently concluded that "obtaining an automobile worth $950 or less by theft constitutes petty theft under section 490.2 and is punishable only as a misdemeanor, regardless of the statutory section under which the theft was charged." However, we need not reach this issue because we are dismissing the appeal due to defendant's failure to obtain a certificate of probable cause.

Section 1237.5,[5] subdivision (a), provides that a defendant may not appeal a judgment of conviction entered on a plea of guilty or nolo contendere unless he or she has filed a statement with the trial court "showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings," and has obtained a certificate of probable cause for the appeal. (See *Mendez, supra*, 19 Cal.4th at pp. 1095-1096.) However, "[n]otwithstanding the broad language of section 1237.5, it is settled that two types of issues may be raised in a guilty or nolo contendere plea appeal without issuance of a certificate: (1) search and seizure issues for which an appeal is provided under section 1538.5, subdivision (m); and (2) issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed." (*People v. Panizzon* (1996) 13 Cal.4th 68, 74 (*Panizzon*); see rule 8.304(b).)[6]

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[5] Section 1237.5 specifically provides: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

[6] Rule 8.304(b) specifically provides: "(b)(1) Except as provided in (4), to appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation, the defendant must file in that superior court—with the notice of appeal required by (a)—the statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause. [¶] (2) Within 20 days after the defendant files a statement under (1), the superior court must sign and file either a certificate of probable cause or an order denying the certificate. [¶] (3) If the defendant does not file the statement required by (1) or if the superior court denies a certificate of probable cause, the superior court clerk must mark the notice of appeal "Inoperative," notify the defendant, and send a copy of the marked notice of appeal to the district appellate project.

In other words, if the appeal is based solely upon grounds occurring after entry of the plea, which do not challenge its validity, such as sentencing issues, a certificate of probable cause is not required. (Rule 8.304(b)(4)(B); *People v. Cuevas* (2008) 44 Cal.4th 374, 379.)

The certificate requirements of section 1237.5 "should be applied in a strict manner." (*Mendez*, *supra*, 19 Cal.4th at p. 1098, see *In re Chavez* (2003) 30 Cal.4th 643, 650-655.) The Supreme Court has strongly criticized the practice in some appellate decisions of reaching the merits of the appeal in the interests of judicial economy, notwithstanding the defendant's noncompliance with those certificate requirements. (*Mendez*, at pp. 1097-1098 [rejecting appellate courts' approach of granting "dispensation[ ]" to a defendant not in compliance with section 1237.5, reasoning the defendant may seek same relief by habeas petition]; *Panizzon*, *supra*, 13 Cal.4th at p. 89, fn. 15 ["[T]he purposes behind section 1237.5 will remain vital only if appellate courts insist on compliance with its procedures."].) Indeed, as the Supreme Court in *Mendez* reasoned: "Even if we did not believe that section 1237.5 and rule [8.304(b)] should be applied in a strict manner, we would have to conclude that they should not be applied in a

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[¶] (4) The defendant need not comply with (1) if the notice of appeal states that the appeal is based on: [¶] (A) The denial of a motion to suppress evidence under Penal Code section 1538.5; or [¶] (B) Grounds that arose after entry of the plea and do not affect the plea's validity. [¶] (5) If the defendant's notice of appeal contains a statement under (4), the reviewing court will not consider any issue affecting the validity of the plea unless the defendant also complies with (1)."

relaxed one. History has demonstrated that the search for 'judicial economy' in the expedient disposition of the individual appeal and its peculiar issues has been costly indeed, as fact-specific questions have arisen, time and again, demanding legally indeterminate answers." (*Mendez*, at p. 1098 and fn. 9, italics omitted.) Accordingly, the Supreme Court concluded that relaxing the certificate requirement in search of " 'judicial economy' " has been a "futile" exercise that "must be abandoned." (*Ibid*.) As a result, in the absence of compliance with the certificate requirements, the appeal is not " 'operative' " and the reviewing court must dismiss it. (*Id*. at pp. 1095-1096.)

In determining whether an appeal mandates a certificate of probable cause, courts examine the substance of the appeal: " ' "[T]he crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made." [Citation.]' [Citation.] If the challenge is in substance an attack on the validity of the plea, defendant must obtain a certificate of probable cause." (*People v. Emery* (2006) 140 Cal.App.4th 560, 564-565.) Thus, for instance, a claim that a guilty plea was induced by an illusory promise is a certificate issue, inasmuch as it is a question going to the legality of the proceedings and, specifically, the validity of the plea. (*Panizzon*, *supra*, 13 Cal.4th at p. 76.) A challenge to the factual basis of the plea by reason of a change in the law requires a certificate of probable cause. (*People v. Zuniga* (2014) 225 Cal.App.4th 1178, 1186-1187 (*Zuniga*).) A challenge based on mental incompetence to enter a plea also requires a certificate of probable cause. (*People v. Hodges* (2009) 174 Cal.App.4th 1096, 1104-1105.) Likewise, a certificate must be obtained to secure review of the lawfulness

of the maximum term imposed pursuant to the negotiated plea notwithstanding the multiple punishment prohibition of section 654. (*People v. Shelton* (2006) 37 Cal.4th 759, 766, 770-771.) We must order dismissal of an appeal that is based solely on grounds requiring a certificate of probable cause if the defendant has failed to secure a certificate. (*Mendez, supra*, 19 Cal.4th at p. 1096.)

Here, defendant pleaded guilty to unlawfully taking or driving a 2005 Mercedes C230 while having a prior conviction for the same offense. A guilty plea " ' "admits all matters essential to the conviction." ' " (*Zuniga, supra*, 225 Cal.App.4th at p. 1187.) It "waives the right to an appellate challenge based on insufficiency of the evidence and implies admission that the People can establish every element of the charged offense . . . ." (*People v. Hughes* (1980) 112 Cal.App.3d 452, 460.) In addition to the fact that defendant entered a plea that admitted all matters essential to his felony conviction, he also agreed to a specified sentence of four years to be served concurrently with his sentence in another matter in exchange for his plea. The agreed-upon stipulated sentence was predicated upon defendant's conviction of a felony—i.e., but for a felony conviction, there would have been no basis to impose a four-year sentence to be served concurrently with his sentence in case No. FWV1400786. Under these circumstances, defendant's appeal amounts to an attack on the validity of his guilty plea and the sentence he agreed to as part of that plea. (See *Panizzon, supra*, 13 Cal.4th at p. 89 [challenge to negotiated sentence imposed as part of plea is in substance an attack on the plea].)

Furthermore, subsequent changes in law do not nullify a defendant's guilty plea. (*People v. Camenisch* (1985) 166 Cal.App.3d 594, 608-609; *People v. Powers* (1984) 151 Cal.App.3d 905, 917.) When a defendant pleads guilty, " 'he does [so] under the law then existing . . . .' [Citation.]" (*People v. Barton* (1971) 19 Cal.App.3d 990, 995.) " 'Although he might have pleaded differently had later decided cases then been the law, he is bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act.' [Citation.]" (*Ibid*.; accord, *Doe v. Harris* (2013) 57 Cal.4th 64, 70 ["the parties to a plea agreement . . . are deemed to know and understand that the state . . . may enact laws that will affect the consequences attending the conviction entered upon the plea"].) Defendant has not done so here.

This court's decision in *Zuniga*, *supra*, 225 Cal.App.4th 1178 illustrates these principles. In *Zuniga*, the defendant contended his conviction was void because, based on a Supreme Court case decided after he filed his notice of appeal, there was no longer a factual basis for his plea. (*Id*. at p. 1186.) This court rejected the defendant's contention: The defendant's challenge to the factual basis of the plea was " 'properly viewed as a challenge to the validity of the plea itself.' [Citation.]" (*Id*. at p. 1187.) Because the defendant did not obtain a certificate of probable cause, his challenge was barred. (*Ibid*.; accord, *People v. Pinon* (1979) 96 Cal.App.3d 904, 910 [because a plea removes all questions of guilt essential to a conviction, whether a prior conviction was a misdemeanor or felony is not cognizable on appeal].)

Defendant's claim is tantamount to a challenge to the validity of his plea to the felony count, rather than an attack on a sentencing or post-plea issue for which a certificate of probable cause is unnecessary. (See *Panizzon*, *supra*, 13 Cal.4th at p. 76; *People v. Jones* (1995) 33 Cal.App.4th 1087, 1092 ["Claims regarding the illegality of the judgment, whether on jurisdictional or other grounds, are precisely the types of claims which are covered by [section 1237.5] and require a certificate of probable cause"].) We conclude that defendant's appeal constitutes an attack on the validity of his guilty plea and the negotiated sentence to which he agreed. Because a certificate of probable cause was required to pursue this appeal, we cannot proceed to the merits and are compelled to dismiss the appeal. (*Mendez*, *supra*, 19 Cal.4th at p. 1096.)

IV

DISPOSITION

The appeal is dismissed.

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CODRINGTON
J.

We concur:

MILLER
Acting P. J.

SLOUGH
J.